In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-383

TEXACO INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 462 F.2d 812. The Board's decision and order (Pet. App. A10-A34) are reported at 189 NLRB No. 51.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7-A8) was entered on June 6, 1972, and a timely

petition for rehearing was denied on June 26, 1972 (Pet. App. A9). The petition for a writ of certiorari was filed on September 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the company violated Section 8(a)(1) of the National Labor Relations Act by refusing to allow employees to distribute union literature in a nonwork area of the plant during nonwork time, without regard to whether there existed adequate off-plant channels for the distribution of such literature.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

Pursuant to an agreement reached in 1968 with Local 8-638 of the Oil, Chemical and Atomic Workers Union, which represented the employees at its Eagle Point refinery, the Company authorized the distribution of union literature during nonwork time, on an open area of its premises between the gatehouse entrance to the plant and the employees' building. The Union, in turn, agreed that it would not distribute "political, ethnic or other undesirable literature" (Pet. App. A20).

On December 31, 1969, the Company declined to permit distribution of a union leaflet on Company property on the ground that it contained "undesirable" material (Pet. App. A16-A18).[1] The Union then distributed the leaflet off Company property at the entrance to the plant, and filed unfair labor practice charges against the Company for its refusal to permit distribution at the approved distribution site at the refinery (Pet. App. A19).

The Board, applying its long-established rule that employees have a right to distribute union literature on nonwork areas of company property during nonwork time unless it is shown that the distribution

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[1] The leaflet was a general year-end information bulletin addressed to the Union membership. Its concluding paragraph stated:

> In November, we attended a special Texaco Nationwide Council Meeting. Many problems were discussed and One requires your cooperation * * *. Over the past several months, Texaco has taken a position of nonrecognition of OCAW at various locations in particular, the Ventura [Producing] District in California and at Sales Terminals in Port Arthur, Houston, Dallas, San Antonio and Fort Worth, Texas, Tulsa, Oklahoma, and Lake Charles, La. Attempts to decertify OCAW, have been made at many other locations, including Claymont, Delaware. This Company is using their power, to influence members of our Union to abandon the principle of unity. * * * Without a strong Union, which we now have, a return to the so-called good old days would only be around the corner. Enclosed, is a suggested letter that you may send along with your mutilated credit card to Texaco Inc. If we let this Company know that their policy of Divide and Conquer will not succeed, we will all have a happy new year in 1970. [Pet. App. A18, n. 7.]

would interfere with production or discipline, concluded that the Company violated Section 8(a)(1) of the Act by precluding the employees from distributing the leaflet on the open area at the refinery (Pet. App. A23-A25, A32). The Board found that the appeal to Union members to return their Company credit cards did not urge the type of disloyalty that would remove the appeal from the protection of Section 7 of the Act; that statutory protection was not forfeited because of misstatements made in the leaflet, for they were not "deliberately or maliciously false"; and that the Union had not waived its right to distribute the leaflet by orally agreeing not to distribute "undesirable" material (Pet. App. A27-A30).[2] Finally, the Board found that the Company's reliance on the availability of the public highway for distribution purposes as a justification for refusing use of its property to its employees "misconceives the distinction between the rights of employees and nonemployees as set forth in *Babcock & Wilcox*," 351 U.S. 105 (Pet. App. A31). The Board ordered the Company to cease and desist from the unfair labor practice found (Pet. App. A32-A33).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A1-A6).

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[2] The Board rejected the Company's contention that the question whether the pamphlet was "undesirable" should be resolved under the arbitration provisions of the collective bargaining agreement, on the ground that the understanding concerning the distribution of union literature was not part of that agreement (Pet. App. A31).

ARGUMENT

1. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, this Court sustained the Board's holding that an employer may not lawfully prohibit employees from distributing union literature on company property during nonworking time, unless it were shown that such a ban is necessary in order to maintain production or discipline. Petitioner contends, however, that, since the employees here were already represented by a union, their right to distribute union literature on the employer's property is no greater than that of nonemployee organizers, who are entitled to access to the employer's property only if there are no alternative means of reaching the employees (see *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105). The Board and the court below properly rejected this contention.

There is no valid reason why employees who are organized should have any less right to engage in Section 7 activity on their employer's property than do employees who are not yet organized. A different rule is warranted with respect to nonemployees because they, unlike employees, are outsiders who have not been invited by the employer to spend their day performing work for him on his premises. *Babcock & Wilcox, supra*, and *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, upon which petitioner relies, are not to the contrary. These cases involved nonemployees, and in *Babcock & Wilcox*, the Court specifically stated that the "distinction between rules of law applicable to employees and

those applicable to nonemployees" was "one of substance" (351 U.S. at 113):

> No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. * * * But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration.[8] * * *

2. Contrary to petitioner's assertion (Pet. 10), there is no conflict among the courts of appeals with respect to the issue presented here. The opinion below, as petitioner acknowledges (Pet. 11), is in accord with decisions of the other courts of appeals. The conflict to which petitioner points is one that may have existed between the decisions of the court below and other circuits prior to the decision in the case at bar. Compare *Diamond Shamrock Co.* v. *National Labor Relations Board*, 443 F.2d 52 (C.A. 3), with *National Steel Corp., Great Lakes Steel Div.* v. *National Labor Relations Board*, 415 F.2d 1231

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[8] *National Labor Relations Board* v. *United Steelworkers of America*, 357 U.S. 357, cited by petitioner (Pet. 10), involved the narrow question whether an employer who has adopted a no-solicitation rule, the validity of which was not contested (357 U.S. at 362), commits an unfair labor practice by enforcing the rule against employees where the employer engages in anti-union solicitation. It was only in this limited context that the Court indicated that the alternative means of communication available to the union was a relevant factor in determining whether the no-solicitation rule had been fairly applied (*ibid.*).

(C.A. 6); *Republic Aluminum Co.* v. *National Labor Relations Board*, 394 F.2d 405 (C.A. 5, *en banc*); and *National Labor Relations Board* v. *United Aircraft Corp., Pratt & Whitney Aircraft Div.*, 324 F.2d 128 (C.A. 2), certiorari denied, 376 U.S. 951.

The court of appeals, however, resolved the conflict by distinguishing its earlier decision in *Diamond Shamrock* (Pet. App. A3). That case involved the right of off-duty employees to distribute literature in an area of the plant where they had no authority to be at the time in question (443 F.2d at 56). The employees here, on the other hand, were on-duty employees, lawfully and properly on company premises. *National Labor Relations Board* v. *Rockwell Manufacturing Co.* (*Du Bois Div.*), 271 F.2d 109 (C.A. 3), with which petitioner also claims a conflict (Pet. 10), has some broad language but held only that, where the company has come forward with evidence showing that its ban on employee distribution "was premised on its desire to 'serve production, order and discipline' " and was "enforced * * * to maintain order", the Board must consider alternative means of communication in assessing the reasonableness of the company's ban (271 F.2d at 115-116). Here, however, there was no showing of production or disciplinary necessity, but merely a contention that the content of the leaflet justified a ban on its distribution—a contention that both the Board and the court of appeals rejected on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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